

**Settlement Agreements**

**A Guide to**  
**Submitting Beyond Compliance Projects**  
**And**  
**Requesting Abatement Measures**

**May 2007**

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Where a conflict or ambiguity exists between this Guide and the requirements of the proposed regulations, the regulations take precedence. While every effort has been made to ensure the accuracy of the information contained within this Guide and that it is consistent with the regulations, it should not be construed as legal advice.

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## 1. Acronyms Used In Settlement Agreement Guide

“BCP” means beyond compliance project.

“EP Orders” means environmental penalty orders.

“EP Regulation” refers to O. Reg. **222/07**

“EPA” means the *Environmental Protection Act*, R.S.O. 1990, c. E. 19, as amended.

“ERT” means the Environmental Review Tribunal.

“FIPPA” means the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.

“Ministry” means the Ontario Ministry of the Environment.

“NOI” means a notice of intention

“OEL” means the Ontario Environmental Leaders Program

“OWRA” means the *Ontario Water Resources Act*, R.S.O. 1990, c. O. 40, as amended.

## 2. Purpose and Context

*Environmental penalties are an abatement tool that will help induce violators to take swift corrective action when a violation occurs in order to reduce or prevent harm to the environment or human health and to negate any monetary benefits of non-compliance. Within the scope of the environmental penalty process is a step detailing the Settlement Agreement process. The details of the settlement agreement process and requesting to undertake a beyond compliance project to reduce a penalty value or to undertake abatement measures to attain compliance are described in this document.*

### 2.1. Context

The Ministry of the Environment (“Ministry”) is responsible for developing, enforcing and providing education and outreach on Ontario’s environmental laws. The purpose of environmental penalty orders (“EP Orders”) is to protect the environment by inducing companies to comply with environmental laws and take swift remedial action in the event of a spill, discharge, or other environmental violation.

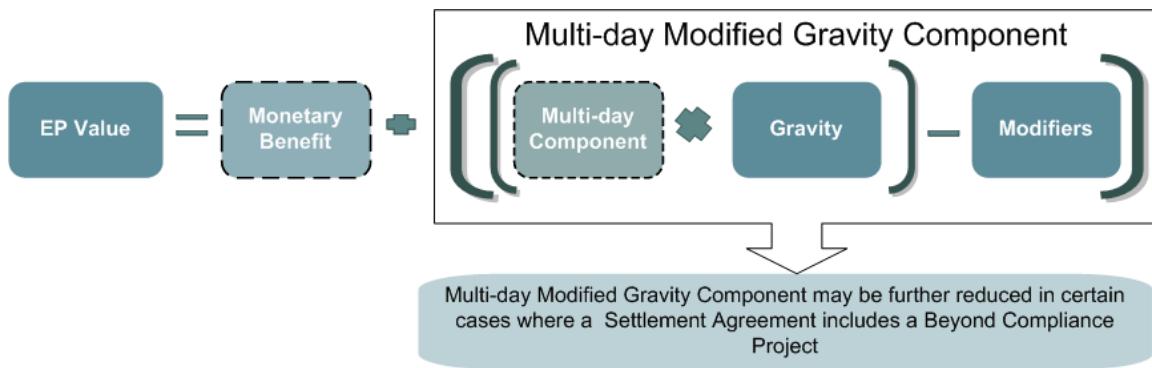
The Ministry expects all companies and individuals to comply with all the environmental laws that apply to them. When one of those laws has not been complied with, the primary objective of the Ministry’s compliance and enforcement program is to see that those responsible act quickly to deal with the impacts of a violation, return to compliance with environmental laws as soon as practicable, and take every practical measure to prevent the recurrence of the incident.

EP orders were introduced through *the Environmental Enforcement Statute Law Amendment Act* (Bill 133), passed in June 2005. This legislation amended the *Environmental Protection Act* (“EPA”) and the *Ontario Water Resources Act* (“OWRA”), establishing the overall framework for EP Orders. O.Reg. 222/07 made under the EPA and O.Reg. 223/07 made under the OWRA provide details of how, when and to which types of violations EPs will be applied. Both regulations contain the same concepts so for ease of reference this Guide will mainly refer to the O. Reg. 222/07 (“EP Regulation”).

Basically, EP Orders are monetary penalties that regulated persons (i.e. companies) may be required to pay if they have violated a requirement under the EPA or the OWRA that is specified in the EP Regulation. Because the primary goal of EP Orders as an abatement tool is to encourage quick and effective action to restore, reduce or prevent harm to the environment or human health, there are ways for regulated persons to have the amount of the penalty adjusted, based on actions they took before, during and after an incident. One of the ways a regulated person may reduce the amount of a penalty is to enter into a settlement agreement with the Ministry to perform specific actions which go above and beyond what is required under any law.

### 2.2. Calculation of Environmental Penalty Amount

An EP Order is comprised of a modified multi-day gravity component and, where applicable, a monetary benefit component (see diagram below).



The purpose of this Guide is to provide information and guidance on the settlement agreement component of the EP process. Please refer to Chapter 4.1 for more details on how settlement agreements affect the calculation depicted in the above diagram.

### 3. Settlement Agreement

The primary purpose of a settlement agreement is to implement measures for the protection of human health and the natural environment beyond those measures required by law.

A regulated person may propose to enter into a settlement agreement with the Director as provided by the legislation<sup>1</sup>.

The settlement agreement may require one or more of the following:

1. **A Beyond Compliance Project (BCP)** – an investment in a plant-based pollution prevention or pollution reduction project that aims to yield human health or environmental benefits beyond those required by any law. The inclusion of a BCP may lead to a reduction in the gravity component of the EP amount to be paid or may cancel the obligation to pay (i.e. 100% reduction) the gravity component of an EP Order, with certain limitations as specified in the regulation (see Chapter 4 of this Guideline for more information);
2. **Abatement Measures** - other abatement actions required by the regulated person to come into compliance with legal requirements that are the subject of the EP Order. Because these are steps taken to achieve compliance, their inclusion in a settlement agreement does not lead to a reduction in the assessed EP amount (see Chapter 5 for details on including abatement actions).

#### KEY FACTS

##### SETTLEMENT

##### AGREEMENTS:

- Are proposed by the regulated person who has received a Notice of Intention to issue an EP Order
- Must be agreed to by both the Ministry Director and the regulated person
- Requires the regulated person to give up right to appeal the EP Order if the settlement agreement is successfully negotiated
- When final, will be made available to the public through the Environmental Registry

<sup>1</sup> See: s. 182.1(9) of the EPA and s. 106.1(1) of the OWRA and s.18 of Environmental Penalties Reg. 222/07 under the EPA and s. 17 of Environmental Penalties Reg. 223/07 under the OWRA.

### **3.1. Whether to Enter into a Settlement Agreement**

It is at the Director's discretion as to whether to enter into a settlement agreement with a regulated person, and whether the results of the settlement agreement negotiations are acceptable, including the scope and value of the proposed BCP and the timeliness of the negotiations, as applicable.

Timeliness is a factor at all stages of the process. As required by s.182.1(8) of the EPA, an EP Order must be issued within 1 year of the date of the violation, or the date on which the information of the violation first came to the attention of the Director or a Provincial Officer (if later than the date of the violation). If discussions regarding a settlement agreement become too lengthy or delayed, the Director may choose to proceed with issuance of an EP Order and not enter into an agreement with the regulated person.

In addition, when deciding whether entering a settlement agreement is appropriate, the Director may consider a range of factors, including:

- the compliance history of the regulated person, including the regulated person's performance under any previous settlement agreement;
- history of cooperation between the regulated person and the ministry;
- the ability of the regulated person to complete the proposed BCP;
- whether the violation itself was the result of willful or deliberate action by the regulated person.

A settlement agreement is signed by both the designated Ministry Director and the regulated person and is binding on the regulated person. If a settlement agreement is reached, the Director would only enter into an agreement if the regulated person consents as part of the agreement not to require a hearing by the Environmental Review Tribunal ("ERT") under s. 140 of the EPA or s. 100 of the OWRA in regard to the EP order (i.e. no appeal of the EP Order to the ERT).

Entering into a settlement agreement may not be appropriate for all EP Orders. The Director retains the right to approve or deny any BCP proposal, including proposals that otherwise meet the requirements of this Guide.

### **3.2. Public Notification**

Final settlement agreements will be published for information purposes on the Ontario Environmental Registry established under the *Environmental Bill of Rights* in accordance with the requirements of the legislation (s. 182.1 (10) of the EPA and s.106.1(10) of the OWRA).

There may be situations (e.g. based on the location, type of incident, type of project), where public input/consultation on the proposed settlement agreement may be appropriate and beneficial.

Prior to entering an agreement, the Director may request that the regulated person engage in consultations with the community on the proposed project (e.g. by holding an open house) before it is finalized when there is or may be significant community interest in the project.

The Director may consider requesting that a regulated person engage in public consultation on a proposed settlement agreement when:

- There is a request from a public liaison committee or other public/community interest group to review the draft project;

- There is a request from communities or municipalities impacted by the incident to review the draft project; or,
- In the opinion of the Director, local public consultation is necessary.

In addition, during the negotiation of a settlement agreement with a regulated person, the Director may post a draft of the proposed settlement agreement or details of a proposed BCP on the Environmental Registry as an information item and request comments from the public. If the Director intends to make such a posting, the regulated person would be allowed an opportunity to discuss the circumstances of the posting and withdraw the proposal, if desired.

The Director may consider posting a proposed BCP to the Environmental Registry when:

- In the opinion of the Director, broader public consultation is necessary; or,
- Any previously consulted group requests broader public consultation on the draft proposed project; and, in the opinion of the Director such consultation will provide beneficial input to the Director's decision of whether to enter into the settlement agreement.

### **3.3. Standards for a Settlement Agreement**

In general, a settlement agreement must comprehensively describe the BCP and, if applicable, the abatement measures. It must specify the components of the project and identify performance and outcome measures that allow the Ministry to verify that the components have been undertaken and completed as proposed by the regulated person and as agreed to by the Ministry. As part of the settlement agreement, the Director may require periodic reports, as well as a final report to be submitted to assess the progress and completion of the project and any abatement measures.

The settlement agreement can reduce the value of one or more EP Orders for multiple violations that arise from a single incident or inspection. See Chapter 4.1 for more specific information on reduction calculations.

As mentioned, the agreement is signed by both the Ministry Director and the regulated person and is binding on the regulated person.

Provisions to amend a settlement agreement will be included as part of any settlement agreement to address circumstances that may arise during implementation of the agreement. However, as part of the provision, both the Director and regulated person would have to agree to any proposed changes.

#### **KEY FACTS**

##### **STANDARDS FOR SETTLEMENT**

##### **AGREEMENTS:**

Section 182.1(9) of the EPA and s. 106.1(9) of the OWRA allow the Director and a regulated person to enter into a settlement agreement that includes the following:

- an identification of the violation in respect of which the EP Order has been or may be made,
- a requirement for the regulated person to take specified steps and the associated timeline by which the steps must be implemented, and
- information regarding the reduction to the amount of the EP Order or the cancellation of the obligation to pay the EP Order.

### **3.4. Settlement Agreement Negotiations and Signing**

The regulated person may propose entering into a settlement agreement at any time, including: (i) during discussions that may be occurring in advance of the issuance of a notice of intention (“NOI”) to issue an EP Order; (ii) during the request for review of an EP Order period and (iii) during the EP Order review period. However, the regulated person is encouraged to advise the Director and local District or Sector Compliance Branch office of its intention to propose a settlement agreement for the Director’s consideration early in the request for review stage of the EP process, identifying if the person is requesting a BCP and/or other abatement measures.

Timeliness as noted above in Chapter 3.1 is a factor when entering into a settlement agreement. There may be circumstances where the Director would enter into a settlement agreement after issuance of an EP Order, however, generally, a successfully negotiated settlement agreement, especially involving a BCP, will be finalized prior to issuance of an EP Order.

A regulated person who wishes to enter into a settlement agreement must send a written request for a BCP and/or abatement measures, together with a complete submission, to the Director who issued the NOI; a copy of the entire submission must be submitted to the manager of the local District office or Sector Compliance Branch involved in the EP issuance process.

Generally, staff at the local District office or Sector Compliance Branch office will be the primary contact for the regulated person with respect to coordinating any negotiations and meetings necessary to the settlement agreement process. Staff in the local office will provide guidance, assistance and recommendations to the Director around whether to enter into a settlement, any public consultation/notification requirements and the contents of an agreement. In addition, the Director may receive input from other staff regarding technical aspects of the proposal or process as required. However, the Director, as the signatory to the agreement, will ultimately decide on whether to enter into a settlement agreement with the regulated person. If the Director determines a written submitted proposal is not appropriate or negotiations on the contents of the agreement on the submitted proposal are not successful, the Director will notify, in writing, the regulated person of the decision not to proceed with a settlement agreement. Similarly, a person who has submitted a formal request for a settlement agreement shall notify, in writing, the Director if they choose to withdraw their proposal. Successful negotiations will result in an agreement which includes the signatures of both the Director and a person designated to represent the regulated person.

### **3.5. Non-Compliance with a Settlement Agreement**

As mentioned in Chapter 3.3, the settlement agreement is binding on the regulated person. When there is non-compliance with a settlement agreement, the Ministry reviews the incident in accordance with Compliance Policy F-2. Non-compliance with a settlement agreement is not an offence under the EPA or the OWRA and is therefore not subject to prosecution. However, the Ministry may:

- issue a new EP Order for non-compliance with a settlement agreement; and/or
- issue an order if the settlement agreement included abatement measures that have not been completed.

Non-compliance with a settlement agreement is a Type 2 violation under the EP regime (Table 2 of the Regulation) and is classified as less serious, serious or very serious depending on the type of settlement agreement (BCP or abatement measures) and the consequences of the violation as shown below in Table 1.

**Table 1: Seriousness Classification of the Settlement Agreement Violation**

Contents of Settlement Agreement	Seriousness of Contravention		
	Less Serious	Serious	Very Serious
<b>BCP</b>  (s. 14 of EPs Reg. 222/07 & s. 13 of EPs Reg. 223/07)	The regulated person took steps to implement all of the provisions of the agreement, but not within the time specified in the agreement.	The regulated person took steps to implement the provisions of the agreement, and those steps had some effect in preventing, eliminating or reducing the discharge of a material into the natural environment.	The regulated person failed to take any steps to implement the provisions of the agreement that would have had some effect in preventing, eliminating or reducing the discharge of a material into the natural environment.
<b>Abatement Measures</b>  (s. 15 of EP Reg. 222/07) under EPA	Contravention does not result in an adverse effect or interfere with the Ministry's capacity to protect and conserve the natural environment, or have the potential to do either.	Contravention interferes with the Ministry's capacity to protect and conserve the natural environment or has the potential to do so; and does not result in an adverse effect and does not have the potential to do so.	Contravention results in an adverse effect or has the potential to do so.
<b>Abatement Measures</b>  (s. 14 of EP Reg. No.223/07) under OWRA	Contravention does not impair the quality of the water of any waters or interfere with the Ministry's capacity to protect and conserve the natural environment, or have the potential to do either.	Contravention interferes with the Ministry's capacity to protect and conserve the natural environment or has the potential to do so; and does not impair the quality of the water of any waters and does not have the potential to do so.	Contravention impairs the quality of the water of any waters or has the potential to do so.

In addition, non-compliance with a settlement agreement will become a factor in assessing the compliance history of a regulated person in the future. It may lead the Director to refrain from entering into a settlement agreement with the regulated person in the future.

## **4. Beyond Compliance Projects (BCP)**

A BCP proposed under a settlement agreement is a plant-based pollution prevention or pollution reduction project which aims to yield tangible human health and/or environmental benefits. Specifically, the regulated person takes steps to prevent, eliminate or reduce the discharge of a contaminant into the natural environment beyond those required by: an Act of Ontario or Canada; a regulation or instrument under an Act of Ontario or Canada; or a public body. The BCP is intended to prevent or reduce the discharge of contaminants (pollutants) from the regulated person's plant.

The Ministry recognizes that industry may be already active in developing and implementing pollution prevention and reduction projects at their facilities. The Ministry has provided the option of conducting a BCP to reduce the value of an EP Order or cancel the obligation to pay an EP Order as another mechanism to motivate continuous improvement beyond compliance in the environmental area by Ontario industries regulated by the EP regulations.

Proposing a BCP is entirely at the discretion of the regulated person who is in the best position to determine whether such a project is possible and in the plant's interest.

The Ministry recognizes that there are transaction costs for both the Ministry and the regulated person in regard to the submission, negotiating and monitoring a BCP. Thus, the Ministry encourages a regulated person who is considering a BCP to ensure that the BCP is clearly defined in terms of what is proposed and its benefits. As well, all submissions must meet the information submittal requirements detailed in Chapter 4.3 of this Guide.

BCPs that are appropriately developed and implemented will secure improvements in environmental quality and reduce the risk of environmental harm for the benefit of the people of Ontario. The settlement agreement process can also promote an atmosphere of cooperation and partnership between the Ministry, the regulated person and those benefiting from the projects.

### **4.1. BCP Component of the EP Calculation**

As noted above, a regulated person may obtain a further reduction to the gravity component of an EP Order or cancel the obligation to pay the gravity component of an EP Order in accordance with the s. 18 of the Environmental Penalties Reg. 222/07 and s. 17 of the Environmental Penalties Reg. 223/07 by entering into an agreement with the Director that specifies the regulated person will complete a BCP. No reduction can be made for a settlement agreement that includes only abatement measures or to any monetary benefit component of an EP Order.

As set out in s.18 (3 and 4) of the EP Regulation, if the regulated person enters into a settlement agreement with the Director to implement a BCP, the Director may allow a reduction up to and including 75 per cent of the modified multi-day gravity component of the EP order for all violations. The amount invested in a BCP must be at least three times greater than the dollar value of the reduction in the EP amount – that is the regulated person must invest \$3 in the BCP for every \$1 reduction in the gravity portion of the EP Order.

As set out in s. 18(2) of the EP Regulation, for certain violations, the Director may also allow the regulated person to enter into an agreement where the modified multi-day gravity component can be reduced a further 25%. However, to obtain any further reduction, as set out in s. 18(5(b)) of the regulation, the regulated person must invest \$5 in the BCP be for every \$1 reduction in the gravity portion of the EP Order. A listing of those violations where it is

possible to achieve a 100% reduction in the modified multi-day gravity component (cancel the obligation to pay the gravity component) is included in Appendix 1.

See Table 2 below for two examples of the BCP reduction to an EP.

**Table 2: Examples- BCP reduction to Gravity Component of an EP**

Item	BCP to reduce gravity component of EP by 75% (\$3:\$1 ratio)	BCP* to cancel the gravity component of EP (75% - \$3:\$1 ratio and final 25% - \$5:\$1 ratio)
1. Modified Gravity Component of EP	\$20,000	\$20,000
2. BCP Cost	\$45,000	\$70,000
3. Reduction	\$15,000	\$20,000
4. Final Gravity Component of EP	\$ 5,000	\$0.00

\*only allowed for EP Orders for violation(s) listed in Appendix 1

In the first example, a BCP that would reduce the EP to the minimum penalty is calculated as follows:  $\$20,000 \times 75\% \times 3 = \$45,000$ . The remaining minimum gravity component of the EP is calculated as:  $\$20,000 \times 25\% = \$5,000$ . In the second example, a BCP that would reduce the EP to zero is calculated as follows:  $(\$20,000 \times 75\% \times 3) + (\$20,000 \times 25\% \times 5) = \$70,000$ .

As part of the submittal process, the regulated person must provide a documented and reliable estimate of BCP costs to the Director. For purposes of calculating any reduction, the net present after-tax cost of the BCP is considered for: capital costs; one-time non-depreciable costs; and annual operating costs and savings which will be considered on a case-by-case basis.

If the actual cost of the project is greater than the original projected cost of the BCP, the regulated person will still be obligated to satisfy the terms of the agreement and implement the project.

An EP Order that is issued for the violation that gave rise to the settlement agreement may include provisions to address a situation where the actual BCP costs are significantly less than the estimated cost of the project. Generally, such provisions of the EP Order will ensure that any penalty reductions given for the BCP reflect its actual costs as opposed to its projected costs. A final report signed by an authorizing officer or director of the company that documents completion of the BCP, the human health and/or environmental benefits achieved and the costs involved is required for all settlement agreements implementing a BCP.

## 4.2. Types of BCPs

A BCP must involve a plant-based pollution prevention or pollution reduction activity or project that is not otherwise legally required under any statute.

In order to maintain integrity to the process of providing a reduction in the value of an EP, there are some situations where a BCP generally would not be considered by the Director; for example:

1. A regulated person cannot already be implementing or planning to implement the proposed BCP within the next 12 months from the date of the violation giving rise to the EP Order (i.e. the project is underway and part of the plant's current year budget). Exceptions that may arise relate to broad pollution prevention projects that are conducted over multiple years. The Ministry may consider a phase of a multi-phase project or consider a project that the regulated person has considered but is planning for the future. By doing so, the Ministry and the plant will be securing that the pollution prevention or reduction project is undertaken and that the benefits to human health and the environment are realized.
2. A regulated person cannot have already committed to the project through another written agreement with a Provincial Ministry, federal, municipality or other agency where they will receive some type of benefit or recognition for conducting the project. This could include commitments made by a member of Ontario's Environmental Leaders ("OEL") Program.
3. A regulated person may not receive any government grants or other subsidies in respect of completing the proposed BCP.Pollution Prevention Project

### EXAMPLES OF POLLUTION PREVENTION BCPs

- Substituting a less hazardous or non-toxic solvent for cleaning (e.g. using ascorbic acid instead of trichloroethylene).
- Installing a vapour recovery system to capture and return vaporous emissions.
- Closed-loop recycling where waste materials produced during the manufacturing process are returned to production within the same manufacturing process.

### 4.2.1. Pollution Prevention Project

Pollution prevention is the use of processes, practices, materials, products or energy that avoid or minimize the creation of pollutants and wastes, at the source.<sup>2</sup>

The types of pollution prevention BCPs that may be proposed for a settlement agreement include:

- equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, and substitution of raw materials;
- conservation or increased efficiency in the use of energy, water or other materials at the plant

<sup>2</sup> Canadian Council of Ministers of the Environment definition

The Ministry promotes pollution prevention through the preferential approach of source reduction, reuse of product and non-product outputs, or closed loop recycling. Prevention or recycling at the source eliminates the need for off-site recycling or treatment and disposal.

#### **4.2.2. Pollution Reduction Project**

A pollution reduction project is one that reduces the amount of pollution discharged into the environment. Where a pollutant or waste stream already has been generated or released, a pollution reduction approach (recycling, treatment, or disposal techniques) may be appropriate, so long as it does not create an increased or adverse cross-media impact on public health or the environment.

The types of pollution reduction BCPs that may be appropriate in a settlement agreement include:

- reducing the discharge of pollutants through more effective end-of-pipe or stack removal technologies;
- installing technology to reduce or eliminate fugitive emissions;
- recycling of residuals for use as raw materials in production off-site that reduce the need for treatment, disposal or consumption of energy or natural resources.

Examples of a pollution reduction projects are thermal destruction of an organic solvent; recovery/regeneration of catalysts; or using control technologies, such as a diesel particulate filter or other controls, to reduce emissions from on-site equipment (e.g. forklifts, sweepers, scrubbers, or powered cranes).

#### **4.2.3. Additional Considerations**

There are several considerations that provide additional flexibility to the development of an appropriate and acceptable BCP; for example:

- BCPs do not have to relate to the violation that is the subject of the EP Order (for example if the contravention relates to a spill to water, the BCP could be in relation to the reduction of the discharge of pollutants to air);
- a project that, when completed, accelerates compliance with a regulated compliance date by at least 2 years (for instance, a compliant plant that must meet a reduced air standard in 5 years proposes to meet that future air standard in 2 years);
- plant-based BCPs that are proposed for other plants owned/operated by the regulated person in Ontario could be considered by the ministry on a case-by-case basis. The Ministry, however, gives preference to projects proposed for the plant that is the subject of the EP Order.

### **4.3. Beyond Compliance Project Submittal Process**

This guidance is to be used by the regulated person who wishes to formally submit a BCP to the Ministry. As noted in Chapter 3.4 of this Guide, the regulated person may wish to discuss with staff of the local District or Sector Compliance Branch Office and the Director of their intent to submit a project for the Director's consideration prior to formal submission. However only BCP proposals that fulfill the information requirements as detailed in this chapter and the Submittal Form will be considered as a BCP to reduce or cancel the obligation to pay an EP Order.

Information contained in BCP submittal form is not considered confidential and will be made available to the public upon request. Information submitted as supporting information may be

claimed as confidential but will be subject to the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

The following sub-chapters give an overview of the Settlement Agreement Proposal Submittal Form and details the information that is expected to be provided on that form.

#### **4.3.1. Section 1 of the Form: Contact Information**

**Environmental Penalty Notice of Intent No.** is the Notice of Intention No. provided on a NOI issued to the regulated person.

**Regulated Person Name** is the regulated person that received the NOI and that has the legal responsibility for the proposed BCP.

**Mailing address** is where the regulated person wishes to receive any correspondence in relation to the BCP submittal and settlement agreement.

**Project Manager** is the primary contact at the regulated person’s plant who will receive any oral or written communication regarding the BCP submittal and settlement agreement.

#### **4.3.2. Section 2 of the Form: Plant Information**

**Plant Name** - this is the name under which the site is known, e.g., X Pulp and Paper Site.

**MOE District (Area)/Sector Compliance Branch Office** - this is the name of the District (Area)/Sector Compliance Branch Office of the Ministry in whose area of jurisdiction the plant is located.

**Plant Address** is the legal description of the site if different than the mailing address.

#### **4.3.3. Section 3 of the Form: Beyond Compliance Project Information**

A BCP proposal must contain the information necessary for the Director to make a decision on whether the proposed project warrants a further reduction to the modified gravity portion of a proposed EP Order for a violation. At a minimum, a proposal must include:

**BCP Name:** The reference name of the BCP.

**BCP Type:** This is the type of proposed BCP including pollution prevention and/or pollution reduction, or other.

**BCP Description:** This is a description of the proposed BCP and what it entails, including the change(s) proposed (e.g. equipment-related change, personnel/procedure-related change or materials-related change). A description of the specific input materials, products and waste streams affected, as well as any innovative or unique qualities of the proposed BCP should be provided.

For instance, it is proposed that x chemical, which is considered a toxic substance under Reg. XX, be substituted by y chemical which is a less harmful substance in z process(es). While x chemical required disposal at a hazardous treatment site, y chemical will be treated within the plant’s on-site sewage treatment process, with any residual waste going for disposal at a non-hazardous landfill site.

**Project Benefits:** This is a detailed explanation of the expected health and/or environment benefits of the BCP (i.e. performance and outcome measures), quantified to the extent possible.

For instance, in regard to a project that reduces the amount of a contaminant emitted to the environment, the following must be identified:

- the name and Chemical Abstract Service (CAS) number of contaminant, if applicable
- the effects of the contaminant or item that is proposed for reduction (e.g. carcinogen, smog-causing pollutant, etc. ), if applicable
- baseline information pertaining to the current use/consumption of the substance targeted for reduction
  - current release or consumption of the substance that is being reduced. The chosen units of measurement will be appropriate to each substance (e.g. tonnes per year, micrograms per cubic, etc.)
  - the production level (e.g. 100 %) at which the release/consumption is occurring
  - the year corresponding to the information (e.g. 2006)
- reduction target for the substance or item
  - the final target amount after the reduction which represents absolute reductions unless other specified (e.g. 1 tonne)
  - target production level that is a relative % to baseline (e.g. 100%)
  - the achievement year which is the year when the reduction is completed.

For instance, a plan may identify that in 2006, the plant emits 1 tonne of a contaminant that is at 100% production level. The reductions when the BCP is completed will result in the plant emitting 0.5 tonnes of a contaminant at 100% production level in 2008. An absolute reduction of 0.5 tonnes over the 2 year period.

A narrative description of the benefits may also be included (e.g. substituting x chemical with y chemical will lower the risk to humans and the environment because y chemical is not toxic to humans).

The regulated person should not include any benefits or reductions that will be attributable to outsourcing production, shutting production lines or by replacing one substance with another that causes or is capable of causing greater levels of pollution.

For waste reduction targets, indicate where and how the residual waste will be disposed of and, where possible, explain the net environmental benefits resulting from the reduction/treatment/disposal of this waste.

### **Approval Requirements**

In this section of the submittal form, identify any approvals that will be required in order to carry out the proposed BCP, including any federal, provincial or municipal requirements.

### **Estimated BCP Costs**

For the purpose of calculating the costs of a BCP and consequently applying the costs towards a reduction of a modified gravity portion of an EP order, the net present after-tax cost of the BCP is considered. The BCP may include the following:

1. One-Time Capital Costs. These costs include all depreciable investment expenditures, including such items as equipment (e.g. pollution control equipment), and machinery and instrumentation.

2. One-Time Non-Depreciable Costs. These costs include such items, such as developing a training program, regulatory approvals fees, costs of materials and labour to start up the BCP.
3. Net Annual Operating Costs (on a case by case basis). These costs include annually recurring costs associated with implementing a BCP. Specifically, these are items such as labour, raw materials, energy and utilities and waste disposal. The net change associated with the BCP would be used (difference between savings and costs). The number of years for which the annual costs are being applied must be specified. If the annual costs are negative (i.e. reflecting net cost savings), the number of years should usually correspond to the useful life of the related capital equipment.

The net present value accounts for the time-value of money (i.e. the value of a dollar tomorrow is not the same as a dollar today). This values the worth of a project over time, in today's dollars. The BCP project must reflect the after-tax costs as it is expected that the BCP costs will appear the same as other business costs on the regulated person's tax returns. If the regulated person certifies that it will not deduct BCP costs then the costs do not need to be adjusted for taxes.

The regulated person must submit a detailed accounting of the net present after-tax value calculation: identifying all cost estimates, including the source and date of the cost estimates and all discount (interest) and tax rates applied.

### **BCP Schedule**

Identify the anticipated BCP completion date. Attach to the BCP Submittal form, a schedule that details the BCP implementation, dates for the submittal of status reports to the MOE, the anticipated BCP operational date (when all the capital investments and one-time nondepreciable costs have been incurred, and/or the annual costs will first start to be incurred) and the BCP completion date. The schedule and BCP completion date should clearly identify and reflect the number of years that the regulated person is committing to operate any equipment to result in the specified project benefits.

For instance, if the BCP is to reduce emissions of a contaminant X by 400 kg over three years, then the schedule must reflect three years of operation. This is especially important if annual operating costs are included in the approved BCP value. The regulated person must commit to run the project for at least as long as the number of annual years approved for the BCP Costs.

### **Reporting**

Provide information with the BCP submittal form on the proposed content and frequency of BCP status reports to the Ministry. It must specify components of the project and identify performance and outcome measures that allow the Ministry to verify that the project has been undertaken and completed as proposed by the Regulated Person.

All settlement agreements will require a final report signed by an authorizing officer or director of the company that documents completion of the BCP, the human health and/or environmental benefits achieved and the costs involved.

#### 4.3.4. Section 4 of the Form: Statement of Regulated Person

The statement is to be completed by an authorizing officer or director of the company, certifying to the quality and accuracy of the BCP Submittal Form and that the BCP meets the requirements of this Guide.

#### 5. Abatement Measures in a Settlement Agreement

As noted in Chapter 3, abatement measures may be included in a settlement agreement. The settlement agreement may identify abatement measures:

1. that must be taken by the plant to achieve compliance or to prevent a recurrence regarding the violations that are the subject of the EP; or
2. that were initiated at the time of the incident but not yet completed at the time of issuing the EP Order and for which reductions based on mitigative measures were applied to the EP Order. Including those measures in a settlement agreement provides greater certainty that the requirements will be carried out by the regulated person.

In this way, a settlement agreement is another abatement tool that can be used by the Ministry to ensure that a regulated person obtains and maintains compliance in regard to the incident. However, in this situation the regulated person would be the party who proposes a settlement agreement that would contain abatement measures in contrast to a Ministry directed order. As with any settlement agreement, it is at the Director's discretion whether to agree to include abatement measures in an agreement. The Ministry may assess the situation and determine that another abatement tool is more appropriate in accordance with Compliance Policy F-2.

In addition, the inclusion of these abatement measures does not reduce the obligation to pay the EP amount beyond the reduction that is provided in the regulations for mitigating the effects of a violation – only the successful negotiation of a settlement agreement that contains a BCP may reduce the gravity component of an EP Order.

At a minimum, the agreement must include:

- a comprehensive description of the proposed abatement measures including who will conduct the work, how the measures will be carried out and the objective of each proposed measure in regard to attaining and achieving compliance; and,
- a proposed schedule that includes a completion date, together with any appropriate intermediate steps against which the Ministry can assess compliance of the abatement measures. The company should detail the reports that will be submitted to the Ministry to confirm progress in implementing the abatement measures.

Generally, the Director will only agree to an abatement measure in a settlement agreement that will be completed within 12 months of the commencement of the agreement, unless the regulated person can demonstrate that a longer period is necessary in the circumstances to properly implement the measures.

#### KEY FACTS

- Offers a regulated person another abatement approach to achieving compliance – Ministry agrees to enter into a settlement agreement rather than using another abatement tool (e.g. violation-based order, for required actions).
- Does not reduce the obligation to pay the EP amount because the abatement measures are not beyond compliance

### **5.1. Request for Abatement Measures**

As noted in Chapter 3.4, staff at the local office will be the primary contact for the regulated person in regard to coordinating any negotiations and meetings necessary to the settlement agreement process. However, any written request for abatement measures should be sent to the Director who issued a notice of intent to issue an EP Order, with a copy of the entire submission going to the manager of the local District office or Sector Compliance Branch who is involved in the EP process.

The submission must provide sufficient detail to allow the Director to make a decision on whether to enter into the agreement and to meet the content requirements of an agreement. If the abatement measures require an approval(s) under Ministry legislation, (e.g. sewage works approval under s. 53 of the OWRA), the description must address this aspect of the proposed abatement measures and schedule. The regulated person should outline the content and frequency of reports that will be submitted to the Ministry to confirm progress in implementing the abatement measures.

## Appendix 1: EP Violations

As noted in Chapter 3 and set out in s. 18(1) of the EP Regulation, a regulated person may cancel the obligation to pay a gravity component of an EP Order for certain violations. These violations are set out in Table 2 to the EP Regulations and are those violations that may be subject to an EP Order commencing December 1, 2008. More specifically, these are the violations set out at items 6, 9, 11 and 12 of Table 2 to the EPA EP regulation and items 5, 7, 8 or 10 of Table 2 of the OWRA EP Regulation and are summarized below. Refer to Table 2 to the EP Regulations for a complete listing of violations.

- s. 53(1) of the OWRA (Approval for Sewage Works)
- All provisions of the MISA regulations, except those related to forthwith reporting of exceedances of discharge standards in the MISA regulations:
  - O. Reg. 215/95 (Electric Power Generation)
  - O. Reg. 561/94 (Industrial Minerals)
  - O. Reg. 64/95 (Inorganic Chemical)
  - O. Reg. 214/95 (Iron and Steel Manufacturing)
  - O. Reg. 562/94 (Metal Casting)
  - O. Reg. 560/94 (Metal Mining)
  - O. Reg. 63/95 (Organic Chemical Manufacturing)
  - O. Reg. 537/93 (Petroleum)
  - O. Reg. 760/93 (Pulp and Paper)
- s. 17 of the EPA (Remedial Orders)
- s. 18 of the EPA (Director Orders - Preventive Measures)
- s. 91.1 of the EPA (Spill Prevention and Spill Contingency Plans)
- s. 97 of the EPA (Orders by Minister, Spills)
- s. 157 of the EPA (Provincial Officer Orders)
- s. 157.1 of the EPA (Provincial Officer Orders – Preventive Measures)
- s. 16 of the OWRA (Provincial Officer Orders – Violations)
- s. 16.1 of the OWRA (Provincial Officer Orders – Preventive Measures)
- s. 16.2 of the OWRA (Provincial Officer Orders – Sewage/Water Works)
- s. 31 of the OWRA (Prohibiting/Regulating Sewage Discharge)
- s. 32 of the OWRA (Director's Order – Alleviate Effects of Impairment to Water Quality)
- s. 61 of the OWRA (Sewage Works to be Kept in Repair)
- s. 91 of the OWRA (Director's Order – Sewage Disposal)

Violations related to unlawful discharges that only ever allow for a reduction of up to 75% of the gravity component of an EP order are listed below. For a more detailed description of these violations, please refer to Table 2 to the regulations.

- s. 14 of the EPA and s. 30(1) of the OWRA (Pollution Prohibition)
- Discharge standards in a regulation, authorizing document or control document
- Acute toxicity failures in the MISA regulations
- s. 92 of the EPA (Notification of Spills)
- s. 93 of the EPA (Duty to Restore the Natural Environment)
- s. 30(2) of the OWRA (Notification of Pollutant Discharge)
- Forthwith reporting of exceedances of discharge standards in the MISA regulations
- Reporting of exceedances of discharge standards in an order
- s. 182.1(9) of the EPA (Settlement Agreements)